

45631
DO

SERVICE DATE – JANUARY 26, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 167 (Sub-No. 1189X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN HUDSON
COUNTY, NJ

Docket No. AB 55 (Sub-No. 686X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN
HUDSON COUNTY, NJ

Docket No. AB 290 (Sub-No. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE
EXEMPTION—IN HUDSON COUNTY, NJ

Decided: January 25, 2017

These three cases (collectively, the Harsimus Abandonment Proceeding) involve a request to abandon an approximately 1.36-mile portion of a line of railroad, known as the Harsimus Branch, located in the City of Jersey City, N.J. By a decision served on July 5, 2016, the resolution of all pending and future discovery disputes in the Harsimus Abandonment Proceeding was referred to a Federal Energy Regulatory Commission (FERC) Administrative Law Judge (ALJ). By a decision served on October 26, 2016 (October 2016 Decision), the ALJ, among other things, dismissed James Riffin (Riffin) from the Harsimus Abandonment Proceeding, struck his filings, prohibited him from submitting further filings in the Harsimus Abandonment Proceeding, and directed him to pay certain attorneys fees.

On October 31, 2016, Riffin filed a “Petition(s) for Other Relief” with the Board stating that he intended to appeal the ALJ’s decision to the Board and seeking guidance from the Board regarding the appropriate regulations under which an administrative appeal of the ALJ’s discovery decision should be filed. The City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (collectively, the City) filed a reply on November 4, 2016. In the absence of a Board ruling, and notwithstanding his pending Petition for Other Relief, on November 14, 2016, Riffin filed an appeal with the Board of the October 2016 Decision under 49 C.F.R. § 1115.2, which he supplemented on

November 21, 2016. On November 21, 2016, the LLC Intervenor¹ filed a reply to, and motion to strike, Riffin's Petition for Other Relief and the City's reply and, on December 5 and 15, 2016, they filed additional pleadings opposing Riffin's appeal. Riffin filed an opposition to the LLC Intervenor's motion to strike and a supplement to his appeal on November 29, 2016. The City filed an opposition to Riffin's appeal on December 2, 2016 and, on December 5, 2016, filed an opposition to both of Riffin's November 29 filings, and filed an opposition to the LLC Intervenor's November 21 motion to strike. On December 9, 2016, Riffin filed a document containing observations regarding his appeal.

On December 20, 2016, Riffin filed a motion to dismiss the Harsimus Abandonment Proceeding.² Conrail and the City filed replies to Riffin's motion to dismiss on December 21, 2016, and January 9, 2017, respectively.

On December 21, 2016, the Board, recognizing Riffin's attempt to follow the Board's regulations with respect to his administrative appeal, served a decision tentatively accepting Riffin's November 14 appeal while it considered Riffin's pending Petition for Other Relief concerning the appropriate regulations under which his appeal should be based. The Board stated that this would suspend the application of the relevant regulations that would make the ALJ's decision administratively final pending further order of the Board.³

On January 4, 2017, the ALJ terminated discovery in the Harsimus Abandonment Proceeding. The City filed a motion to reopen the January 4, 2017 decision on January 9, 2017.

The Board has now clarified its procedures for interlocutory appeals of ALJ decisions. See Finch Paper LLC—Pet. for Declaratory Order, FD 35981 (STB served Jan. 11, 2017). In that decision, the Board explained that the FERC ALJ's authority is delegated by the Chairman of the Board under 49 C.F.R. § 1011.6. It then explained that the appeal at issue in that case was interlocutory and not an appeal of an initial decision on the merits, a practice no longer used at the Board. For interlocutory appeals, the Board explained that it will read 49 C.F.R. § 1115.1 and § 1115.9 in conjunction as a two-part standard, as follows:

An interlocutory appeal is an appeal prior to a final Board decision on the merits of a proceeding. Under § 1115.9(a), a Board employee's ruling on discovery (including an ALJ's ruling) may be appealed on an interlocutory basis only if it

¹ The LLC Intervenor^s are 212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Erie Street, LLC, 317 Jersey Avenue, LLC, 354 Cole Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC, and 446 Newark Avenue, LLC.

² On January 17, 2017, Riffin also filed "Observations Regarding his Motion to Dismiss."

³ The following day, Riffin filed a "Note Regarding the STB's December 21, 2016 Decision."

meets one of the four enumerated circumstances (regarding party participation; document inspection; privilege; or irreparable harm, prejudice, or detriment to the public interest). Thus, § 1115.9(a) is a threshold determination concerning whether the decision is of a type that is subject to an interlocutory appeal. If the § 1115.9(a) threshold is satisfied and the ruling can be appealed prior to a final Board decision, the merits of the appeal are analyzed under the standard outlined in § 1115.1(c). Although appeals are sometimes granted, under that standard, such appeals “are not favored,” and “will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.” Id.

Finch Paper, FD 35981, slip op. at 5-6 (internal footnote omitted).

By its terms, 49 C.F.R. Part 1115 generally does not apply to appeals in abandonment and discontinuance proceedings instituted under 49 U.S.C. § 10903. See 49 C.F.R. § 1115.1(a). Part 1152 of the Code of Federal Regulations, which otherwise governs appeals in abandonment proceedings, however, does not contemplate a discovery process. Thus, the Board has clarified that “notwithstanding § 1115.1(a), appeals of discovery decisions in abandonments, to the extent discovery may occur, will be governed by the same rules and standards that apply to other discovery appeals.” Finch Paper, FD 35891, slip op. at 5 n.9.

The appeal Riffin already filed of the October 2016 Decision, however, was filed pursuant to § 1115.2, titled “Initial Decisions.” (See generally, Riffin Appeal.) Section 1115.2 pertains to an initial decision on the merits by an ALJ, which, as the Board explained in Finch Paper, is a procedural practice that the agency no longer utilizes. Finch Paper, FD 35981, slip op. at 4. A ruling by a FERC ALJ on a discovery issue is not considered to be a determination on the merits; thus, such a ruling is not an initial decision under § 1115.2. Id. Here, the resolution of all discovery disputes in the Harsimus Abandonment Proceeding were referred to an ALJ. In the October 2016 decision, the ALJ imposed discovery sanctions on Riffin consistent with 49 C.F.R. § 1114.31. Therefore, to be heard by the Board before a final decision on the merits, Riffin’s appeal on these discovery matters must be shown to qualify as an interlocutory one pursuant to § 1115.9. Accordingly, the Board will dismiss Riffin’s § 1115.2 appeal and will not consider the various replies and supplements thereto that have been filed.⁴ However, Riffin will have the opportunity to refile an interlocutory appeal applying §§ 1115.9 and 1115.1 as described in Finch Paper.

An interlocutory appeal under § 1115.1 and § 1115.9 does not stay the effect of the FERC ALJ’s October 2016 Decision pending a Board ruling on the appeal. Compare 49 C.F.R. § 1115.2(f) (providing that such an appeal will stay the effect of the action pending determination of the appeal) with §§ 1115.1 and 1115.9. The ALJ’s October 2016 Decision struck Riffin’s pleadings, dismissed Riffin from the Harsimus Abandonment Proceeding, and

⁴ The Board will also deny the LLC Intervenors’ motion to strike.

prohibited him from further participation in it. Thus, at this point, Riffin is restricted to filings addressing his appeal only and the Board will strike Riffin's motion to dismiss and the replies thereto.⁵

As a final matter, Riffin has requested an extension of time to file his appeal and an extension of the allowable number of pages. (Riffin Pet. 9-12.) These requests are premised on Riffin's Petition for Other Relief regarding the applicable regulations and the need for additional time to obtain and attach a copy of the ALJ hearing transcripts. (*Id.*) Riffin's request to exceed the page limits under 49 C.F.R. § 1115.2(d) is moot because, as discussed above, § 1115.2 does not apply here. Moreover, the ALJ hearing transcripts have been added to the record; therefore, Riffin's request for additional time is also moot.

Consistent with § 1115.9(b), the deadline for Riffin to file a new interlocutory appeal of the October 2016 Decision under the applicable standards of §§ 1115.9 and 1115.1 will be seven days from the service date of this decision. Any reply to an interlocutory appeal filed pursuant to this decision will be due within seven days.

It is ordered:

1. Riffin's Petition for Other Relief is granted in part and denied in part, as described above.
2. The LLC Intervenor's motion to strike Riffin's Petition for Other Relief and the City's November 4, 2016 reply is denied.
3. Riffin's November 14, 2016 appeal of the October 2016 Decision, as supplemented on November 21, 2016, is dismissed. Riffin may file a new appeal of the October 2016 Decision, under the applicable standards as set forth in this decision, no later than February 2, 2017. Replies are due within seven days of the filing of an appeal.
4. Riffin's December 20, 2016 motion to dismiss, Conrail's December 21, 2016 response, the City's January 9, 2017 reply, and Riffin's January 17, 2017 observations are stricken from the record.
5. The City's January 9, 2017 motion is denied as moot.

⁵ In its January 9, 2017 motion to reopen the ALJ's decision terminating discovery, the City argues that discovery should be reopened considering the Board's tentative acceptance of Riffin's § 1115.2 appeal and Riffin's motion to dismiss. The City's motion will be denied as moot.

6. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.